Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1372

ALDENS, INC.,

Petitioner,

v.

THOMAS J. MILLER, AS ATTORNEY GENERAL OF THE STATE OF IOWA AND AS ADMINISTRATOR OF THE IOWA CONSUMER CREDIT CODE, SENATE FILE 1405, 65TH GENERAL ASSEMBLY, 1974,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Thomas J. Miller as Attorney General of the State of Iowa and as Administrator of the Iowa Consumer Credit Code opposes the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in the above case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit has been officially reported at 610 F.2d 538 (8th Cir. 1979); the opinion of the United

States District Court for the Southern District of Iowa, Central Division, is reported at 466 F.Supp. 379 (1979).

QUESTIONS PRESENTED

1. Does the commerce clause of the United States Constitution prohibit the State of Iowa from regulating interest rates that can be charged Iowa residents by an interstate mail order company whose place of business is located out of the State of Iowa?

2. Does the due process clause of the Constitution of the United States prohibit the State of Iowa from regulating interest rates that can be charged Iowa residents by an interstate mail order company whose place of business is located out of the State of Iowa?

STATEMENT OF THE CASE

The Respondent would refer to the Findings of Fact of the District Court set forth in full herein as an accurate and sufficient presentation of the facts stipulated in this case.

Findings of Fact

Aldens is a general retail merchandise business located in Chicago, Illinois, and sells its goods solely by mail order to purchasers who reside in all fifty states, including Iowa. Aldens does not have any office, distribution house, sales house, warehouse, or any other place of business in Iowa nor does the company advertise its merchandise for sale in Iowa newspapers, on billboards in Iowa, or by placing advertisements with Iowa radio or television stations. There is no telephone listing for the company in the state. No agent, salesman, canvasser, solicitor, or any other type of representative exists in Iowa to sell or take orders, to deliver or service the merchandise sold by Aldens. The company does not own any real or personal property in Iowa.

Aldens mails catalogs to certain Iowa residents approximately four times per year, supplementing these with "flyers" approximately six to eight times per year. Included in the catalogs are application forms for credit accounts with Aldens, and, upon completion of the forms, Iowa residents mail them to the plaintiff's Chicago headquarters, the only office which can extend credit to purchasers. The credit agreement used by Aldens states that it is an Illinois contract governed by Illinois law, and provides for a monthly finance charge of 1.75 percent on the portion of the average daily balance of the customer's account on amounts of $350 or less for an annual rate of 21 percent, and a monthly finance charge of one percent on that portion of such balance in excess of $350 for an annual rate of 12 percent. These rates are in conformance with Regulation Z promulgated by the Federal Reserve Board under the Federal Truth-In-Lending Act, 12 C.F.R. § 226.7 (1978), and are also in compliance with Illinois law. Albeit, the rates are not similarly in compliance with Chapter 537, which limits the finance charge on consumer credit sales to a maximum of 1.5 percent per month on the first $500 of a customer's annual rate of 18 percent.

Merchandise sold to Iowa purchasers is delivered on an f.o.b. point of origin basis to those customers by deposit in the United States mail, delivery to a common carrier in Chicago, or by shipment from some point outside the State of Iowa. On credit sales Aldens pays the shipping, handling, and transportation costs, and then bills the customer for those charges.

Aldens retains only a purchase money security interest in any merchandise sold pursuant to the credit agreement with its purchasers. The purpose of this provision of the credit agreement is to conform to Aldens' accounting practices and to inform purchasers that the company has such a security interest to the extent of the unpaid bal-

ance of the merchandise. Aldens does not file any financing statements or other interest documents with the State of Iowa, nor does the company enforce any security interest in such merchandise. Aldens has a security interest in unpaid-for merchandise only to the extent provided by law. In the past, however, Aldens has employed Iowa collection agencies to collect bad debts in the event an Iowa customer failed to make at least a $5 payment on his account in the six-month period. The company has indicated that it may or may not continue this practice after the conclusion of this litigation.

Aldens is not required to collect or remit Iowa sales or use taxes, or to pay any other Iowa taxes.

In 1976, approximately 1.72 percent of Aldens sales were made to Iowa purchasers and approximately 1.42 percent of this amount was derived from credit sales. The number of Aldens active credit accounts in Iowa for 1976 totalled approximately 20,200 and the average credit account balance equaled approximately $178.22.

THERE IS NO REASON TO GRANT THE WRIT

Although this Court has jurisdiction to grant a Writ of Certiorari to review the decision of the Eighth Circuit Court of Appeals, there is no reason to do so. This case does not meet the criteria set forth in subsection 1(b) of Rule 19, Supreme Court Rules, as considerations governing review of a court of appeals' decision on certiorari. The decision of the court below is in accord with the decisions of the Courts of Appeals of the Third, Seventh, and Tenth Circuits and is fully consistent with all applicable decisions of this Court. Certiorari was denied by this Court in the three circuit court decisions and in each instance the party seeking review was Aldens, the Petitioner herein.

ARGUMENT

1. The Court of Appeals Properly Held That The Due Process And Commerce Clauses Of The United States Constitution Do Not Prevent Iowa From Regulating The Mail Order Credit Charges And Practices Of Aldens Directed Towards Its Iowa Customers.

A. *The Cases Uniformly Hold That The States May Regulate Mail Order Solicitation And Selling Activities Of Foreign Corporations To Protect Their Residents Against Usurious Interest Practices And Overreaching.*

The present case is identical in every respect with the Aldens' line of cases which have been considered by three other circuit courts of appeal. In two of these cases, a version of the Uniform Consumer Credit Code was the statute under review as it was below. As Aldens acknowledges, in 1975 Judge Gibbons undertook a detailed analysis of the historical state interests vis-a-vis the slight burdens on interstate commerce and ruled that there were no constitutional violations in *Aldens, Inc.* v. *Packel*, 524 F.2d 38 (3rd Cir. 1975); cert. denied, 424 U.S. 943 (1976).

In 1977, the Seventh Circuit reviewed the application of the Wisconsin Consumer Credit Code to Aldens and, in weighing the interests under the commerce clause, reached an identical result in *Aldens, Inc.* v. *LaFollette*, 552 F.2d 745 (7th Cir. 1977). Aldens' Petition for Writ of Certiorari was again denied by this Court at 434 U.S. 880 (1977). In *Aldens, Inc.* v. *Ryan*, 571 F.2d 1159 (10th Cir., 1978) the Tenth Circuit found no contravention of the due process or commerce clauses and upheld the application of the Oklahoma Consumer Credit Code to Aldens' mail order activities with Oklahoma consumers. Certiorari was denied by this Court at 439 U.S. 860 (1978).

On December 7, 1979, the Eighth Circuit Court of Appeals reviewed the opinion of the District Court of Iowa and followed its sister circuits in ruling that Aldens was controlled by the Iowa Consumer Credit Code when extending credit to Iowa residents. It concluded there was a sufficient nexus with Iowa and found that there was no conflict with the commerce clause upon a careful balancing of the interests. (*Aldens, Inc.* v. *Miller*, 610 F.2d 538 (8th Cir. 1979).

Consistent with this unbroken line of authority is this Court's dismissal for lack of a substantial federal question of a direct appeal by a mail order house raising issues similar to those raised by the Petitioner herein. *Meierhenry* v. *Spiegel, Inc.*, 277 N.W.2d 298 (South Dakota 1979) *appeal dismissed, sub. nom. Spiegel, Inc.* v. *South Dakota*, ——U.S. ——, 62 L.Ed.2d 17 (1979). The facts in that case were similar. Spiegel is a Delaware mail order company with its principal place of business in Chicago. Like Aldens, its contact is primarily by mailed catalogs. In the extension of credit to South Dakota customers, Spiegel sought to charge the Illinois interest rate of 21.6%, which exceeded the rate allowable under South Dakota law. The Supreme Court of South Dakota ruled that Spiegel was controlled by the South Dakota statute. On appeal to the Supreme Court, the case was dismissed for lack of a substantial federal question.

This dismissal is in accord with similar dismissals for lack of a substantial federal question of other court decisions which sustain the constitutionality of state regulations involving out-of-state mail order operations. *See* e.g., *People* v. *Fairfax Family Fund, Inc.*, 47 Cal. Rptr. 812, 235 Cal.App.2d 881 (1965), *appeal dismissed* (for want of substantial federal question) 382 U.S. 1 (1965), which upheld California's regulation of mail order loan transactions between a Kentucky-based firm and residents of California; *Minister's Life & Casualty Union* v. *Haase*, 30 Wis.2d 339, 141 N.W.2d 287 (1966), *appeal dismissed* (for want of a substantial federal question) 385 U.S. 205 (1966), and *United National Life Insurance Co., et al.* v. *California*, 58 Cal. Rptr. 599, 427 P.2d 199 (1967), *appeal dismissed* (for want of a substantial federal question) 389 U.S. 330 (1967), which upheld Wisconsin and California regulations of mail order transactions between foreign corporations and residents of those states; and *State of Washington* v. *Reader's Digest Ass'n, Inc.*, 81 Wash.2d 259, 501 P.2d 290 (1972), *appeal dismissed* (for want of a substantial federal question) 411 U.S. 945 (1973), which upheld the application of the State of Washington's Consumer Protection Act to the mail solicitations of Reader's Digest.

Petitioner argues that the due process clause prohibits the application of Iowa law to an interstate mail order house for lack of a sufficient nexus to the regulating state. The four circuits which have considered Aldens' contention have concluded that the threshold of state interest is sufficient for the state to utilize its power to regulate credit with its citizens. The Court in *Packel* comments:

> It suffices to hold that Pennsylvania's interest in the rates which its residents pay for the use of money for purchase of goods delivered into Pennsylvania is substantial enough to satisfy any due process objection to its attempt at regulating the subject matter. . . . Since *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957), it has been clear that the due process clause defines a rather low threshold of state interest sufficient to justify exercise of the state's sovereign decisional authority with respect to a given transaction.

Aldens, Inc. v. *Packel* at 43.

The *Packel* decision recognized the realistic approach developed by this Court of examining the extent of con-

tacts with, and the degree of interest of, the regulating state. See, *McGee* v. *International Life Insurance Co.*, 355 U.S. 220 (1957); *Travelers Health Ass'n* v. *Virginia*, 339 U.S. 643 (1950); *International Shoe Co.* v. *State of Washington*, 326 U.S. 310 (1945); and *Hoopeston Canning Co.* v. *Cullen*, 318 U.S. 313 (1943). For example, in *Travelers Health Ass'n* v. *Virginia*, this Court held that the State of Virginia could subject a mail order insurance company to its laws, even though Travelers had no agents in Virginia and solicitation of new members was largely accomplished through the mails. The Court "rejected the contention . . . that a state's *power to regulate* must be determined by a "conceptualistic discussion of theories of place of contracting or performance" and instead "accorded 'great weight' to the consequences of the contractual obligations" in the regulating state and the " 'degree of interest' that a state had in seeing that those obligations were faithfully carried out." *Travelers Health Ass'n* v. *State of Virginia*, at 648, (emphasis added) citing *Hoopeston Canning Co.* v. *Cullen*, at 316.

Certainly, Aldens' systematic commercial exploitation of the residents of the State of Iowa and the impact on the 20,000 Iowans to whom Aldens has extended credit creates a significant nexus to the State of Iowa sufficient under the due process clause. This regulation does not disadvantage the interstate seller; rather it simply requires that out-of-state seller to comply with Iowa public policy in the area of consumer credit transactions as evidenced by its *Consumer Credit Code*. In doing so, Aldens stands on equal footing with other domestic and out-of-state sellers in transactions with Iowans.

The District Court makes the additional observation that this Court's opinion in *National Geographic Society* v. *California Board of Equalization*, 430 U.S. 551 (1977) may provide another "link" with the State of Iowa.

> Assuming *arguendo* that the reasoning in *National Bellas Hess* in fact controls the disposition of this case, it nevertheless appears that Aldens' credit transactions with Iowans are subject to the provisions of Chapter 537. . . . In contrast with the mail order house in *National Bellas Hess*, Aldens has previously employed Iowa agencies to collect on various bad debt accounts of Iowa residents and the Iowa courts were available to Aldens in seeking to enforce its contracts. Certainly this utilization of collection agencies might well suffice as a significant and substantial "link" between the state and Aldens for the purposes of due process in the taxing context.

Aldens, Inc. v. *Miller*, 466 F.Supp. 579, 586 at n. 13.

Four circuit courts have now found that Aldens' activities are substantial enough to provide the nexus with the regulating state required under the due process clause. These decisions are in full accord with applicable holdings of this Court in the area of due process.

B. *The Cases Uniformly Hold That Such Regulations Do Not Impose An Undue Burden On Interstate Commerce.*

The Aldens' line of cases are controlled by, and are consistent with, the opinions of this Court in the commerce clause area. The general rule formulated by this Court's decisions is that state regulations involving a legitimate local interest are not invalid because they affect interstate commerce unless the burden on such commerce is clearly excessive in relation to local benefits. *Great Atlantic & Pacific Tea Company, Inc.* v. *Cottrell*, 424 U.S. 366 (1976); *Pike* v. *Bruce Church Ins.*, 397 U.S. 137 (1970); *Head* v. *New Mexico*, 374 U.S. 424 (1963); *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963); *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440 (1960); *Robert-*

son v. *California*, 328 U.S. 440 (1945); *South Carolina State Highway Dept.* v. *Barnwell Bros.*, 303 U.S. 177 (1938); *Sligh* v. *Kirkwood*, 237 U.S. 52 (1914).

The state interest in exercising its police power to protect its citizens from being charged usurious interest rates is unassailable. Every state in this nation presently exercises, as they have for generations, its authority to regulate credit transactions to its citizens. *See* 45 Am.Jur.2d, Interest and Usury, § 4. Since 1969, eleven states, including the State of Iowa, have adopted a form of the Uniform Consumer Credit Code in the interest of standardizing consumer credit rules on a nation-wide basis while allowing each state to maintain control over all aspects of consumer credit within its borders.

The interest of the state in protecting its citizens from usurious charges is well-illustrated by Aldens' own testimony in the lower court. Over 20,000 Iowa consumers would pay $81,600 per year in excess of interest allowed by Iowa statute; across the United States, the aggregate windfall to Aldens would be $3.5 million per year. The enormity of these figures for Aldens, just one of many mail order interstate traders, graphically counters Aldens' allegation that the state interest is *de minimus* and amply demonstrates the significant need for such a police power. To suggest that the regulation of credit is not an appropriate police power of the states is to ignore its historically pervasive position in this nation.

The burdens upon interstate commerce, if any, are slight and incidental. Aldens contends that it sustains prohibitive costs in having to prepare its catalogs and maintain a bookkeeping method for consumers of each state. The costs of using a small tabular chart setting forth the interest rates of the various states is minimal and appears to be the common practice by nearly all

interstate traders, including Aldens, to escape the need for separate catalogs to each state. The present level of sophistication in computer technology must certainly overcome bookkeeping problems. Aldens is merely being required to comply with a statute to which domestic sellers must also adhere.

The Circuit Court of Appeals relies on the language of the court below to counter the Aldens' contention that interstate commerce is being burdened unduly.

> The purposes of the commerce clause, *inter alia*, include the notions that commercial enterprises in every state are entitled to substantial equality of access to a free national market, and that commercial intercourse should be protected from invidious restraints imposed by the legislatures of the several states. In the case *sub judice*, these purposes are not offended by the provisions delineated in Chapter 537. Adherence by foreign sellers to the maximum interest rate prescribed by the Iowa legislature does not restrict the flow of commerce between the states in any constitutional sense. A state may regulate intrastate activities occurring in connection with interstate commerce, and such legislation will not be subject to invalidation merely because of its incidental effect or indirect burden on interstate commerce.
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> * * * *
>
> Aldens argues that the increased cost of complying with the regulations contained in Chapter 537 seriously discriminates against Aldens' interstate sales to Iowa residents and thus unduly burdens interstate commerce. But the mere cost of doing business with Iowa residents to interstate sellers does not amount to a substantial burden on interstate commerce. Contrary to Aldens' conclusion, Iowa is not discriminating against interstate commerce through the operation of Chapter 537—for it is manifest that interstate mail order companies have access to the Iowa

> market on the very terms as any other seller, whether or not the particular seller is physically located in the state.

Aldens, Inc. v. *Miller* at 539.

The weight of Aldens argument in its Petition concentrates not so much upon the right of the State of Iowa to regulate credit extended to its citizens as it focuses upon policy considerations for establishing higher interest ceilings. The secondary legal sources upon which Petitioner relies are marshalled more in support of a particular economic theory of credit and do not successfully challenge the constitutional permissibility of state credit regulation. This argument is best addressed to the legislature or Congress where interest ceilings may be regulated.

There is no "invidious restraint" of Aldens; indeed, it is granted equal opportunity with domestic businesses in its dealings with Iowa citizens. Clearly, the commerce clause does not require a state to grant a preferred status to interstate traders. Consequently, the Eighth Circuit Court of Appeals, after careful balancing, joined with three sister circuits in holding that there was no violation of the commerce clause.

2. The Cases Cited By Aldens Are Not Relevant To The Constitutionality Of State Consumer Credit Regulatory Statutes.

Aldens relies upon four decisions of this Court in support of its contention that it is exempt from state regulation because it is a "pure" interstate trader. These cases fall within three categories: *Marquette National Bank* v. *First of Omaha Service Corp., et al,* 439 U.S. 299 (1978) which is founded upon the *National Bank Act* and the federal preemption doctrine; *National Bellas Hess* v. *Illinois Department of Revenue,* 386 U.S. 754 (1967) and *National Geographic Society* v. *California*

Board of Equalization, 430 U.S. 551 (1977), which are tax cases; and *Allenberg Cotton Co.* v. *Pittman,* 419 U.S. 20 (1974), which is based upon denial of state forum access to foreign corporations operating in interstate commerce.

Contrary to Aldens' position, the *Marquette National Bank* decision depends entirely upon the specific language of the *National Bank Act* which this Court has determined preempts state regulatory statutes as applied to out-of-state national banks. Justice Brennen clearly identified the issue before the Court.

> The question for decision is whether the National Bank Act, Rev. Stat. § 5197, as amended, 12 U.S.C. § 85, authorizes a national bank based in one state to charge its out-of-state credit card customers an interest rate on unpaid balances allowed by its home state, when that rate is greater than that permitted by the state of the bank's nonresident customers.

Marquette National Bank v. *First of Omaha Service Corp., et al,* at 301.

The exclusive concentration of *Marquette National Bank* is upon the language and legislative history of the *National Bank Act,* and its relation to the federal preemption doctrine. Consequently, the Court does not undertake any balancing of state interests vis-a-vis federal interest. The Eighth Circuit succinctly dispensed with Aldens' interpretation of *Marquette National Bank.*

> That case held Congress, in the specific language of the National Bank Act, 12 U.S.C. § 85 intended to pre-empt state law. The holding makes it clear that the case is inapplicable here.

Aldens, Inc. v. *Miller,* at 540.

At no juncture does the language or the implication of the opinion question state authority to establish and enforce credit regulatory statutes on an interstate trader

extending credit to consumers of that state. Aldens can derive no benefit from *Marquette National Bank.*

In a second line of argument, Aldens offered for the fourth time its interpretation of *National Bellas Hess, Inc.* v. *Illinois Department of Revenue.* Petitioner argues that the "close scrutiny" test set forth in *National Bellas Hess* should be applied in the instant case.

National Bellas Hess dealt with the constitutionality of a State of Illinois requirement that imposed use tax collection responsibility upon an out-of-state mail order retailer with no offices or agents in Illinois. The four circuits reviewing Aldens' interpretation have found it wanting. Judge Gibbons observes in his Third Circuit opinion:

> Tax cases of necessity come in for special due process scrutiny. . . . There is simply no reason why in weighing the significance of that interest for due process purposes, we would impose on Pennsylvania the higher burden it would have to meet in a tax collection case.

Aldens, Inc. v. *Packel,* at 43 and 44.

The Seventh Circuit notes that "Aldens' protestations that *National Bellas Hess* is not a tax case are contradicted by the opinion itself." The court then goes on to cite *Freemen* v. *Hewitt,* 329 U.S. 249 (1946), wherein this Court discussed at length the greater burden on interstate commerce presented by tax cases as opposed to police regulations designed to safeguard local interests. (*Aldens, Inc.* v. *Ryan,* 571 F.2d 1159 (10th Cir. 1978) at 752). In the instant case, Aldens is not subject to any taxing statute; rather, it is being required to comply with a legitimate regulation of lending practices and, consequently, the appeal of Aldens for the application of the *National Bellas Hess* case herein must fail.

Aldens depends upon another more recent tax case, *National Geographic Society* v. *California Board of Equalization,* for the proposition that Aldens has no "nexus" with the State of Iowa sufficient to support state regulation. *National Geographic* held that the State of California could impose use tax liability on an out-of-state mail order seller on the basis that two unrelated California advertising offices of the seller provided a sufficient nexus with the taxing state. Although *National Geographic* refines *National Bellas Hess* by specifying the minimum nexus between an out-of-state seller and the taxing state, it, like *National Bellas Hess,* employs the "close scrutiny" test accorded tax issues, and therefore, has no application to the present case wherein a state seeks to protect its citizens by regulating the credit charges and practices of out-of-state mail order sellers.

The final case advanced by Petitioner in support of its argument is *Allenberg Cotton Co.* v. *Pittman. Allenberg* involved the application of a Mississippi statute which prohibited the use of the state courts to foreign corporations that failed to qualify to transact business in the state. This Court held that the statute constituted an impermissable burden on interstate commerce as applied to a Tennessee cotton merchant who attempted to use the Mississippi courts to enforce a contract to purchase cotton from a Mississippi farmer.

Allenberg stands in sharp contrast to the present case. Mississippi's refusal to provide a judicial form denied out-of-state traders an effective means of enforcing contracts in interstate commerce. The insubstantial interest of the State of Mississippi, on balance, failed in light of the federal interest in uninterrupted operation of interstate lines of commerce.

Here, however, there is a proven Iowa interest in protecting its citizens from the imposition of unconscionably

high interest charges. Indeed, Congress has expressly deferred to the states in the setting of maximum finance charges in consumer credit transactions. *See* 15 U.S.C. § 1610(b).

While Mississippi sought directly to deny foreign corporations access to its courts and thereby hobble their ability to enforce contracts, Iowa merely requires that out-of-state mail order companies comply with its interest rate ceiling. Petitioner and other mail order companies retain the right to engage in business across state lines on equal footing with any domestic seller; Aldens is simply prevented from overreaching and exacting usurious rates of interest from Iowa residents.

In conclusion, it is abundantly clear that none of the cases relied upon by Aldens stands for the proposition that a mail order company is immune from state regulation. What has emerged is a review by four circuit courts of appeal consistent with procedures mandated by decisions of this Court. In every instance, the court has determined that the state's interest in protecting its citizens from usurious interest rates is strong and persuasive while the burden on interstate commerce, if any, is slight. Such an analysis was made by the District Court below and was concurred in by the Eighth Circuit Court of Appeals.

CONCLUSION

The courts below have balanced the sound historical interests of the State of Iowa in protecting its citizens from overreaching and usurious rates of interest by utilizing its police power with the *de minimus* burden on interstate commerce demonstrated by Aldens. The Eighth Circuit Court of Appeals now joins the Third, Seventh and Tenth Circuits in an unbroken line of authority that state regulatory laws governing credit and interest rates do not violate the due process and commerce clauses of

the United States Constitution and are therefore permissable. These decisions are consistent with the opinions of this Court and Petitioner fails to successfully raise any conflicting decisions pertinent to the issues of this case. The authorities relied upon by Petitioner are distinguishable and inapplicable to the instant case.

Finally, this Court has three times denied certiorari in cases identical to the present case. Moreover, this Court has found that a case on all fours with the Aldens line of cases should be dismissed on direct appeal for lack of a substantial federal question.

For the foregoing reasons, it is respectfully submitted that the Petitioner has presented no issues worthy of discretionary review by this Court and that, therefore, its Petition should be denied.

Respectfully submitted,

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